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No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti where their life or freedom would be threatened on account of political opinion.

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RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Haitian Centers Council, Inc., *et al.* oppose the petition for a writ of certiorari because the decision below is correct and warrants no further review. Should the Court wish to grant the writ, however, it should limit its review to the only issue on which the circuits are divided, namely, whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.

STATEMENT

Before 1980, § 243(h)(1) of the Immigration and Nationality Act ("INA") "authorized" the Attorney General "to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of . . . political opinion" (emphasis added). To conform with our binding treaty obligations under Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, Petitioners' Appendix (Pet. App.) at 253a ("Refugee Convention"), Congress amended that provision in 1980 to mandate that "[t]he Attorney General *shall not* deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion" 8 U.S.C. § 1253(h)(1) (emphasis added). Despite that unambiguous directive, on May 24, 1992, petitioners began summarily and forcibly returning all interdicted Haitian aliens to Haiti, including *bona fide* refugees whose life or freedom would undeniably be threatened on account of political opinion.

No government in the Western world has ever before taken to the high seas to intercept fleeing refugees and to return them, forcibly and without process, to their persecutors.[1] Petitioners' policy has encircled the people of Haiti with a "Floating Berlin Wall," which bars refugees from escaping persecution and death. Moreover, the policy renders the U.S. Coast Guard agents of a murderous dictatorship in Haiti that the Executive Branch has itself condemned as illegitimate.

In a careful and well-reasoned decision, the Second Circuit held that petitioners' unprecedented policy violates the plain language of § 243(h)(1). That decision is correct and should be

1. To the contrary, United States officials have continued to condemn "in principle and in practice" the British policy of forcibly and involuntarily repatriating Vietnamese boat people fleeing to Hong Kong. *N.Y. Times*, Jan. 25, 1990, at A6.

left undisturbed. The Second Circuit's decision merely enforces the unambiguous language and intent of both § 243(h) and the self-executing treaty provision that it reinforces, Article 33 of the Refugee Convention. Pet. App. at 15a-35a. The majority opinion's sound reasoning on this point fully exposed the error of the Eleventh Circuit's shallow and conclusory ruling in *Haitian Refugee Center, Inc. v. Baker* (*HRC v. Baker*), 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), Pet. App. at 214a-216a, a case that involved different parties and circumstances than those presented here. *See infra*, pp. 15-19.

The Solicitor General now asks this Court, sitting as a court of error, to review all aspects of the Second Circuit's opinion. Should this Court wish to grant review, it should limit certiorari to the specific question that divides the circuits: whether the laws of the United States, including § 243(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion. By broadly wording the question presented, however, the Solicitor General asks this Court to review not only that issue but also three collateral questions, which fail the standards for certiorari review in Supreme Court Rule 10. Petition for Certiorari ("Pet.") at 12 (Issues No. 1, 2, and 4). Respondents oppose certiorari on these extraneous questions, which are fact-specific, not fully litigated below, or issues over which no genuine circuit split exists. This Court should not divert time and resources away from the core issue disputed here to adjudicate collateral questions of little national importance or to correct alleged errors in a particular case.

I. Background

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (entered into force Oct. 4, 1967), thereby accepting as domestic law the 1951 Refugee Convention. Article 33 of the Refugee Convention mandates, categorically and without geographic limitation, that "[n]o Contracting State shall expel *or return* ("*refouler*") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (emphasis added). In the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107 (1980), Congress amended § 243(h) of the INA to conform to Article 33, deleting the preexisting limiting language "within the United States" and specifying that "[t]he Attorney General *shall not* deport or *return any alien*...to a country if the Attorney General determines that such alien's life or freedom would be threatened." 8 U.S.C. § 1253(h) (emphasis added).

The following year, the United States began interdicting, screening, and returning Haitians from vessels in international waters, pursuant to a bilateral executive agreement signed with the Haitian government, Agreement Effected By Exchange of Notes, signed at Port-au-Prince, September 23, 1981, T.I.A.S. No. 10,241 ("U.S.-Haiti Agreement"). That agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly acknowledged that even on the high seas the United States was bound by "*international obligations mandated in the Protocol* Relating to the Status of Refugees" (emphasis added).[2] Evaluating the legality of this proposed program, the Justice Department's own legal counsel concluded that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims." *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 248 (1981) ("OLC Opinion") (emphasis added).[3]

2. "Under these arrangements," the accord declared, "*the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status*" (emphasis added).

3. Ten years later, in a letter entitled "Re. *Haitian Refugee Center, Inc. v. Baker*" and written one month after that lawsuit was filed, the Legal Adviser of the State Department successfully prevailed upon the Office of Legal Counsel (OLC) to withdraw this conclusion, although the text of neither Section 243(h) nor Article 33 had changed in the interim. *See* Pet. App. at 30a-31a. The court below characterized OLC's revised (continued...)

Accordingly, Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), *reprinted in* 8 U.S.C. § 1182 (1988), issued shortly thereafter, directed that with respect to aliens interdicted in international waters, the

> Attorney General shall...take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration...and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*

Section 3 (emphasis added).

Thus, Article 33 of the U.N. Protocol, § 243(h) of the Refugee Act, and the U.S.-Haiti agreement all bound petitioners not to return Haitians interdicted on the high seas to conditions of persecution without first making individualized determinations regarding the credibility of their asylum claims. Pursuant to these legal mandates, for more than ten years petitioners pursued an interdiction program of "preliminary screening before return." Pet. App. at 10a.[4]

II. *HRC v. Baker*

In November 1991, Haitians began fleeing in record numbers following the September 30, 1991 military coup that overthrew the government of President Jean-Bertrand Aristide. Petitioners continued their policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began holding "screened-in" Haitians at the

3.(...continued)
interpretation as "'the sort of *post hoc* litigation posture that is entitled to no deference'" and thus not "the sort of 'extraordinarily strong contrary evidence' needed to nullify the plain langague of Article 33.1." *Id.* at 31a (citations omitted).

4. *See* Pet. at 3 ("Any interdictees who made a credible showing of political refugee status were tentatively 'screened in' *and brought to the United States*, where they could file a formal application for political asylum . . . . Interdictees unable to make such a showing were 'screened out' and returned immediately to Haiti.").

United States Naval Base at Guantanamo Bay, Cuba. In November 1991, Haitian Refugee Center (HRC) brought a suit in the United States District Court for the Southern District of Florida, for itself and a class represented by fourteen named plaintiffs who had been "screened-out," challenging the adequacy of the initial screening procedures. *HRC v. Baker*, Second Amended Complaint at paras. 3, 9-24. The District Court issued several injunctions against petitioners' conduct, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a, 190a.

In opposing certiorari in *Baker*, the Solicitor General specifically represented to this Court that

> Under current practice [followed for more than a decade], any [screened-in] aliens who satisfy the threshold standard *are to be brought to the United States* so that they can file an application for asylum under Section 208 (a) of the [INA] . . . . These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Solicitor General's Opposition to Petition for Certiorari in *HRC v. Baker* at 3 (emphasis added). Yet only five days after this Court denied *certiorari* in *Baker*, petitioners broke that promise, began reinterviewing "screened-in" Haitians *on Guantanamo* without lawyers, and repatriated many of these "screened-in" Haitians to Haiti.

III. *HCC v. McNary I*

Respondents then brought this action in the Eastern District of New York on behalf, *inter alia*, of the "screened-in" Haitians on Guantanamo, challenging petitioners' new policy and seeking an order that no screened-in Haitian on Guantanamo could be reinterviewed or repatriated without counsel. The United States District Court for the Eastern District of New York (Johnson, J.) issued a temporary restraining order ("TRO") and a preliminary injunction against petitioners' practices, and the Second Circuit

affirmed with modifications, directing the district court to "immediately take steps to expedite the trial process." Pet. App. at 117a.[5] In accordance with the Second Circuit's mandate, the District Court has ordered a pretrial conference on September 22, 1992, with trial likely to commence in October.

IV. *HCC v. McNary II*

On May 24, 1992, pursuant to a new order issued by the President from his Kennebunkport, Maine home, petitioners simply dispensed with their legal obligations not to return aliens to a country where such aliens' life or freedom would be threatened. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992), Pet. App. at 260a ("Kennebunkport Order").[6] Instead, petitioners Coast Guard and Immigration and Naturalization Service ("INS") instituted a new interdiction program of "summary return without screening," Pet. App. at 10a, forcibly returning *all* Haitians, including *bona fide* refugees, without any process or questioning, to conditions of persecution and death in Haiti.[7]

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5. The Solicitor General did not move in this Court to stay the Second Circuit's order, and the Second Circuit denied the Government's petition for rehearing and its suggestion of rehearing en banc on July 24, 1992.

6. Although petitioners now claim that the Kennebunkport Order was triggered by foreign policy exigencies, Section 3 of that Order, obviously seeking to fend off judicial review, clearly states: "This order is intended *only* to improve the internal management of the Executive Branch." Pet. App. at 262a (emphasis added).

7. *See* Pet. App. at 13a ("[T]he Kennebunkport Order . . . made no pretense at all of adhering to the Solicitor General's prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.")(emphasis in original). Petitioners claim that "Coast Guard instructions" permit commanding officers of Coast Guard vessels to grant temporary refuge to interdictees "in immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual." Pet. at 8 n.5. But respondents know of no instance when this exception has been invoked. Moreover, it is fanciful to believe that Coast Guard commanders have either the time, the expertise, or the training necessary to conduct asylum interviews.

Just days before this new interdiction program began, more than 30 percent of all Haitians interdicted were being screened in to the United States by INS asylum officers as having credible fears of persecution in Haiti. *See* P.E. 88, Deposition of Scott Busby at 34. But with the stroke of a pen, petitioners declared their indifference to the fears of interdicted Haitians, even as political violence in Haiti spiraled to unprecedented levels. Moreover, notwithstanding § 243(h), § 2(c)(3) of the Kennebunkport Order purported to give petitioner Attorney General "unreviewable discretion" to return to Haiti all Haitians interdicted after May 24 without regard to their fears of political persecution.[8]

Pursuant to this new interdiction program, petitioners have forcibly repatriated more than 3,000 Haitians without any procedures and regardless of their fear of political persecution.[9] On May 28, 1992, plaintiffs moved in the District Court for a TRO challenging petitioners' new policy as *ultra vires* and violative, *inter alia*, of § 243(h) of the INA and Article 33 of the Refugee Convention. The District Court denied relief, but

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8. *See* Kennebunkport Order, Sec. 2(c)(3) ("the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.")

9. In lieu of asylum processing in either Miami or Guantanamo, petitioners offered to process refugee claims at the U.S. Embassy and Consulate in Port-au-Prince under Section 207 of the INA, 8 U.S.C. § 1157, and claim that more than 9,000 applicants have sought refugee status through this route. Pet. at 9, n.6; 30 n.17. But the availability of one form of refuge under the INA—section 207 embassy processing—does not justify petitioners' unilateral elimination for Haitians of two other forms of statutory relief: Section 243(h) protection against involuntary return and Section 208 asylum relief, 8 U.S.C. § 1158. Moreover, the accuracy of this process is highly suspect. Of the nearly 9,000 refugee processing applicants, respondents are aware of fewer than 100 who have actually received refugee status (about 1%) even though in May, INS officials were screening in roughly 30% of all interdicted Haitians as having credible fears of political persecution. In any event, the illegality of summarily returning refugees cannot be cured simply by subsequently allowing them to wait in line in their country of persecution, under dangerous conditions, to apply for asylum that is effectively unavailable through this means.

condemned the change in U.S. policy in the harshest possible terms, holding that "[p]laintiffs undeniably make a substantial showing of irreparable harm . . . ." *Id.* at 166a.[10]

On expedited appeal, the Second Circuit reversed and remanded with instructions to enter the injunction. Writing for himself and Judge Newman over Judge Walker's dissent, Judge Pratt denied that plaintiffs were precluded by the Eleventh Circuit's prior ruling regarding § 243(h) in *HRC v. Baker* because that case involved different parties and different circumstances. *Id.* at 7a-14a. On the merits, the majority concluded that "the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors" constitutes the "return" of "any alien" forbidden by the plain language of § 243(h). Pet. App. at 23a. Moreover, the majority found that the extraterritorial scope of § 243(h) conforms to both the plain language and the purpose of Article 33 of the Refugee Convention in applying to "all aliens, no matter where found." *Id.* at 35a. The majority held that the case was judicially reviewable. *Id.* at 38a. Finally, the Court concluded that neither statutory provisions empowering the President to regulate entry nor the President's constitutional powers as commander-in-chief and the "sole organ" of the nation in its external affairs authorized executive officials to summarily return Haitians to their

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10. The District Court wrote:

> It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement. As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions . . . .

Pet. App. at 167a (footnote omitted).

persecutors, a policy that Congress had explicitly forbidden by enacting § 243(h) pursuant to its plenary immigration power. *Id.* at 35a-38a.

In accordance with the Second Circuit's decision, the District Court entered a preliminary injunction prohibiting petitioners from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of political opinion. Pet. App. at 170a. On August 1, 1992, this Court stayed the lower courts' rulings pending the expedited filing and disposition of the Solicitor General's petition for certiorari.

ARGUMENT

The writ should be denied because the decision below is correct and warrants no further review. The Solicitor General concedes that the Second Circuit decided only one issue that is in "direct conflict" with the Eleventh Circuit, namely, whether § 243(h) applies outside the territorial borders of the United States. Pet. at 12. Should the Court wish to resolve this conflict, it should grant plenary review only of this narrow issue and the alternative grounds for affirmance raised below.[11] The only question properly presented to this Court is whether the laws of the United States, including § 243(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion. The other three issues enumerated by the Solicitor General, Pet. at 12—regarding availability of judicial review, collateral estoppel, and equitable principles—fail the standards of Supreme Court

11. By holding that Section 243(h) of the INA applied extra-territorially to bar petitioners' policy, the Second Circuit did not reach or decide the questions whether the Kennebunkport Order should also be invalidated under Article 33 of the Refugee Convention, the U.S.-Haiti Agreement, or on equal protection grounds. This Court has repeatedly held that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).

Rule 10 and do not warrant this Court's review. These are collateral issues that either were not fully litigated below, were not addressed by the Second Circuit, as to which no circuit split exists, or are fact-specific questions lacking significance outside this case.

I. Availability of Judicial Review

Petitioners first seek review on the ground that judicial review is "impliedly precluded" under the Administrative Procedure Act (APA), leaving respondents with "no basis for invoking the jurisdiction of the U.S. courts to seek the extraordinary relief the courts below ordered." Pet. at 13. Yet as petitioners recognize, their novel claim was neither addressed by the Second Circuit, Pet. at 12, nor dispositive of the Eleventh Circuit's decision in *HRC v. Baker*, Pet. at 13 n.7; Pet. App. at 204a, 214a (Eleventh Circuit decided the merits of plaintiffs' § 243(h) claim despite its determination that judicial review under the APA was precluded). Both the Second and Eleventh Circuits reviewed the executive branch's actions on the merits *without regard to the availability of judicial review under the APA*. Hence, this issue does not genuinely divide the circuits, and does not merit this Court's review.[12] Even if this Court were to reverse the Second Circuit on this ground, its judgment would remain unaffected, for that court, like the Eleventh Circuit in *Baker*, could still decide the merits of plaintiffs' § 243(h) claim despite this Court's determination that judicial review under the APA was precluded.

12. To contrive a circuit conflict on this issue, petitioners posit that "[t]he only plausible basis for judicial review would be the cause of action established by the [APA]." Pet. at 13. Yet the Second Circuit's decision contains no holding or analysis of any kind about the APA or the availability of judicial review under it. Nor did the Eleventh Circuit in *Baker* accept petitioners' analysis of the APA. By rejecting plaintiffs' § 243(h) claim "on the merits" after denying judicial review under the APA, the Eleventh Circuit effectively recognized that the plaintiffs had a cause of action *independent* of the APA. Pet. at 13 n.7.

More fundamentally, petitioners' patently false claim that the INA "impliedly precludes" judicial review under § 701(a) of the APA, 5 U.S.C. § 701(a)(1), conflicts with prior decisions of this Court. This Court long ago settled that § 702 of the APA creates a presumption of judicial review of final agency action. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("[w]e begin with the strong presumption that Congress intends judicial review of administrative action."). This Court has also recognized that the presumption of reviewability does not evaporate in immigration cases. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *Marcello v. Bonds*, 359 U.S. 302 (1955). Lower courts have regularly acknowledged the judicial reviewability of general policies, practices or procedures affecting the rights of aliens, including their right to apply for asylum.[13]

Petitioners ignore this precedent, now claiming that the INA "impliedly" precludes judicial review under 5 U.S.C. § 701(a)(1) by "prescrib[ing] detailed procedures for administrative and judicial review for aliens who claim to be refugees when they seek asylum or withholding of deportation" from within the United States, but no such procedures for refugees who apply from abroad. Pet. at 13. Yet the APA provides that a subsequently enacted "statute may not be held to supersede or modify . . . chapter 7 [providing for judicial review] . . . except to the extent that it does so expressly." 8 U.S.C. § 559. In *Marcello v. Bonds*, 359 U.S. 302 (1955), this Court settled that the APA will be held inapplicable only when Congress expressly so provides.

Petitioners can point to no provision expressly limiting judicial review here. The only remotely relevant INA provision they cite, 8 U.S.C. § 1105a(a), applies only to "judicial review of all *final orders of deportation*" and exclusion, *id.*, not to

13. *See, e.g., Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Morales v. Yuetter*, 952 F.2d 954 (7th Cir. 1991). *See generally Jean v. Nelson*, 472 U.S. 846 (1985).

governmental conduct towards aliens that arises wholly outside the deportation or exclusion process.[14] By its terms and as consistently applied by this Court, as recently as last year in *McNary*, § 1105a does not bar judicial review of claims such as those here, which are wholly unrelated to deportation or exclusion proceedings and which challenge the policy of forcible return without agency procedures, not the review of *individual* case adjudications.[15] Notwithstanding petitioners' claims, courts routinely review a wide range of immigration decisions and practices that occur outside deportation proceedings and for which no specialized INA statutory review provisions exist.[16]

14. Petitioners cite three other provisions, 8 U.S.C. §§ 1157, 1158 and 1253, that establish the substantive rules governing refugee admissions, asylum processing and withholding of deportation, but say nothing at all about judicial review. Pet. at 13.

15. *See, e.g., Cheng Fan Kwok v. INS*, 392 U.S. 206, 215 (1968) ("[W]e believe that . . . Congress quite deliberately restricted the application of § 106(a) [§ 1105a(a)] to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves") (Harlan, J.); *INS v. Chadha*, 462 U.S. 919, 937-39 (1983) (§ 1105a governs review of matters "on which *the final order* is contingent") (emphasis added). *See generally* T.A. Aleinikoff & D. Martin, *Immigration Process and Policy*, 854-62 (2d ed. 1991). Moreover, the provisions of § 1105a apply only to the review of *individual* case adjudications, and not to challenges to the *procedures* used in making such determinations. *See McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985).

16. *See, e.g., ILWU v. Meese*, 891 F.2d 1374 (9th Cir. 1989) (judicial review available for decision regarding definition of aliens independent of § 1105a); *Pancho Villa Restaurant v. U.S. Dep't of Labor*, 796 F.2d 596 (2d Cir. 1986) (judicial review available for denial of alien labor certification independent of § 1105a); *Dina v. Attorney General*, 793 F.2d 473 (2d Cir. 1986) (judicial review available for denial of waiver to return to native country before citizenship application independent of § 1105a); *Parcham v. INS*, 769 F.2d 1001 (4th Cir. 1985) (judicial review available for denial of voluntary departure independent of § 1105a); *Shoreham Cooperative Apple Producers Ass'n v. Donovan*, 764 F.2d 135 (2d Cir. 1985) (judicial review of Department of Labor methodology for determining wages of non-immigrant aliens available despite § 1105a); *International Union of Bricklayers & Allied Craftsman v. Meese*, 761 F.2d

(continued...)

Nor, finally, is review warranted by petitioners' baseless claim that Congress has expressed some general "unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have 'never presented [themselves] at the borders.'" Pet. at 14 (citing a single line of dictum in a footnote of a thirty-six year-old case, *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956)). Courts have repeatedly permitted aliens located outside of the United States to obtain judicial review of immigration decisions affecting them.[17] Nor can petitioners plausibly inflate the narrow and anomalous rule against reviewability of visa decisions by consular officials, Pet. at 14 n.8, into a blanket bar against judicial review of a blatantly lawless interdiction policy, which is set by *nonconsular* executive officials and has nothing to do with individual visas.[18]

16.(...continued)
798 (D.C. Cir. 1985) (judicial review of INS guidelines for determining alien work entry available independent of § 1105a); *Occidental Engineering Co. v. INS*, 753 F.2d 766 (9th Cir. 1985) (judicial review available of denial to reclassify worker status of aliens independent of § 1105a); *Carnejo-Molina v. INS*, 649 F.2d 1145 (5th Cir. 1981) (judicial review available of denial of voluntary departure independent of § 1105a). Petitioners' reliance on *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), *quoted in* Pet. at 13, is similarly misplaced, because respondents seek review of an unlawful immigration policy of summary return without screening, not "particular issues," i.e., a final administrative order of deportation, for which the INA has established a "detailed mechanism for judicial consideration." Pet. at 13-14, quoting *Block*, 467 U.S. at 349.

17. *See, e.g., Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984) (reviewing legality of deportation order on behalf of alien outside the U.S.); *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979) (reviewing INS interpretation of statute allocating visas on behalf of aliens living in U.S. and Mexico); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (reviewing legality of deportation order on behalf of alien outside the U.S.).

18. The consular nonreviewability doctrine originated in the 1920s, long before the enactment of the APA and its strong presumption of judicial review, and survives today only because courts have construed specific provisions of the INA to have codified the doctrine. *See, e.g., Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969) (construing 8 U.S.C. § 1201); *see* (continued...)

In sum, petitioners offer no convincing reason why this Court should expend its energies on the meritless claim that their conduct is not reviewable under the APA, particularly when the opinion below rejected that claim without discussion and the two circuit courts have, without regard to that claim, reviewed the legality of the various Haitian interdiction programs on the merits.

II. Collateral Estoppel

Petitioners secondly ask this Court to sit as a court of error to review the question of collateral estoppel. Petitioners nowhere claim that the Second Circuit broke new ground in collateral estoppel law, only that that court misapplied settled preclusion principles.[19] Pet. at 14-17. A review of that inherently fact-bound issue would require this Court to parse case-specific issues of class definition that have been repeatedly examined by the courts below. Six of the seven judges who have considered petitioners' claim of collateral estoppel have now rejected it in five separate opinions, all noting that this case involves different

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18.(...continued)
generally J. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 30-34 (1991). The nonreviewability rule applies regardless of whether the alien applicant is in the United States or abroad, and thus derives from the nature of consular decisions, not from the location of the aliens. *See, e.g., Burrafato v. U.S. Dep't of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) (alien inside U.S. denied judicial review of consul's decision). Even consular decisions abroad have been judicially reviewed. *See* T.A. Aleinikoff & D. Martin, *supra*, n.15, at 337 (giving examples). Even assuming *arguendo* that the Eleventh Circuit relied on the consular nonreviewability doctrine in *Baker*—which challenged the adequacy of screening procedures—that doctrine has no applicability to the more extreme immigration policy challenged here, which returns all Haitians to Haiti without any screening or individualized consideration of the merits of their asylum claims.

19. Even if the Second Circuit's ruling on that issue were not plainly correct, Justices of this Court have repeatedly reiterated that "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari . . . ." J.M. Harlan, *Manning the Dikes*, 13 Rec. Bar Ass'n of City of N.Y. 541, 551 (1958).

parties and different circumstances than those present in the *Baker* case.[20] Nor can petitioners identify any circuit split on this issue because it was never considered, much less decided by, the Eleventh Circuit. Finally, if collateral estoppel were held to apply, this Court would not even reach the only arguably certworthy issue in this case, namely, whether § 243(h) applies extraterritorially. One could find no clearer example of improvident, *ad hoc* error-correction than if this Court were to grant review—ostensibly to resolve an issue of national importance—and then divert its energies to a settled and case-specific procedural question.

Moreover, the preclusion ruling below is correct. Petitioners protest that the Second Circuit's decision "flouts" the preclusive effect of the earlier decision in *HRC v. Baker*. Pet. at 14. Yet ironically, *petitioners* flout basic principles of preclusion by asking this Court to deny respondents their day in court. As the Second Circuit correctly reasoned, the *Baker* case involved both fundamentally different circumstances and different parties than currently stand before this Court.

First, as the court below found, the new interdiction policy challenged on this appeal did not yet exist—and hence could not be subjected to judicial review—in any prior action. Petitioners cannot brush aside their earlier representation to this Court when they successfully opposed certiorari months ago in *Baker*.[21] Petitioners concede that the executive policy now under challenge

20. *See* Pet. App. at 133a-136a (*HCC I* District Court Memorandum (3/27/92)) (Johnson, J.); *id.* at 149a-152a (*HCC I* District Court Memorandum (4/6/92)) (Johnson, J.); *id.* at 86a-96a (*HCC I* Court of Appeals Opinion) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (*HCC II* Court of Appeals Opinion) (Pratt & Newman, JJ.); *id.* at 40a-41a (Newman, J., concurring). Judge Mahoney did not question the majority's rejection of petitioners' collateral estoppel claim in *HCC I* and dissented only on the merits. *See id.* at 118a-124a (*HCC I* Court of Appeals Opinion) (Mahoney, J., dissenting).

21. At that time, the Solicitor General expressly represented "that ['screened-in' individuals] are to be brought to the United States so that they could file an application for asylum under [the INA]." *See* Brief for United States in Opposition to Certiorari at 3, *HRC v. Baker*.

represents a change from "the government's then-current policy" when *Baker* was decided, but argue that "the entire thrust of the government's position was that the President must retain flexibility to respond to international developments free from judicial interference." Pet. at 16, n. 11. In fact, the thrust of the Solicitor General's earlier position was that this Court should not interfere with the Executive's "longstanding policy" of interdicting *and screening* Haitian refugees, particularly when screened-in refugees were being brought to the United States for asylum hearings accompanied by the full panoply of procedural rights. *See* Brief for United States in Opposition to Certiorari at 3, 8, *HRC v. Baker*. For preclusion purposes, the critical question is not whether petitioners knew that the representation was false when made, but whether circumstances have so changed *after that time* as to make it inequitable to permit petitioners to escape judicial review of their subsequent actions against different parties.

If petitioners had their way, a litigant could test the legality of a comparatively benign practice, then invoke collateral estoppel to hide behind that ruling in a subsequent action challenging an egregiously lawless practice that had not been implemented, announced or even hinted at when the prior practice was being adjudicated.[22] As the Second Circuit correctly reasoned:

> [W]hen the United States (a) resists Supreme Court review on a dramatic issue of such public import . . ., by representing that there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought

22. For example, a school system could successfully defend itself against a claim of racial discrimination brought by black students outside the school system (*cf.* the "screened-out" refugees in *Baker*), then abruptly adopt dramatically discriminatory policies toward black students *within* the system (*cf.* the "screened-in" refugees in this case), claiming that preclusion doctrines immunized its newly lawless conduct from judicial examination.

> to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

Pet. App. at 14a.[23]

Second, it is hornbook law that one cannot be bound by a prior judgment unless one was a party to, or represented by a privy in, the prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979). As the Second Circuit recognized in *HCC I*, respondents could not have been part of the earlier Florida action, both because the named plaintiffs in the Florida action were screened-out while respondents are screened-in, and because the interests of the two groups with regard to the legality of screening were antagonistic. *See* Pet. App. at 93a-96a. The *Baker* class challenged the adequacy of the screening procedures and did not include any screened-in refugees, as those refugees had benefited by the procedures being challenged.[24] The courts below have agreed and ruled repeatedly that the respondents in

23. *See also id.* at 40a (Newman, J., concurring) (petitioners may not "keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then . . . keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel. That would be gamesmanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives"); Restatement (Second) of Judgments § 28(2) (1982) (no preclusion where "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"); *id.* at § 28(5) (preclusion inappropriate where, as here, "[t]here is a clear and convincing need for a new determination of the issues (a) because of the potential adverse impact of the determination on the public interest . . ., (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary . . ., did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.").

24. In *Baker*, the fourteen named representatives were all screened-out. For that reason, the Second Circuit correctly concluded in *HCC I* "that the class defined in the Florida Action was overly broad" and that the claims of the screened-in plaintiffs were not fairly and adequately represented by the screened-out named plaintiffs. Pet. App. at 93a.

this action were not properly part of the class defined in the prior action. *See* Pet. App. at 133a-136a (*HCC I* District Court Memorandum (3/27/92)); *id.* at 149a-152a (*HCC I* District Court Memorandum (4/6/92)); *id.* at 86a-96a (*HCC I* Court of Appeals Opinion); *id.* at 7a-14a (*HCC II* Court of Appeals Opinion).

Furthermore, the *Baker* action involved a class of screened-out Haitians who were interdicted by petitioners *prior* to the Kennebunkport Order. As Judge Pratt noted, one of the requirements for membership in the *Baker* class was that the class member was interdicted pursuant to the *then-existing* United States Interdiction Program. Pet. App. at 9a. Unlike respondents, the screened-out *Baker* plaintiffs challenged the adequacy of the screening procedures, not the absence of any screening. The screened-out refugees have no interest in reinstituting screening, because even if they fled again, they likely would be screened out. By contrast, respondents here are "screened-in" refugees who already have been found to have credible fears of persecution. By both design and mistake, petitioners have forcibly returned these screened-in refugees to Haiti. If screening were reinstituted, many of these refugees would flee again and be screened in.

In short, respondents are entitled to have their claims heard on the merits because they were not properly parties to any prior action and the conduct of which they complain was not known to them at the time of and was not made a part of the prior action. This Court should not devote scarce briefing and argument resources to plenary review of a correct, fact-specific, and uncertworthy collateral estoppel ruling.

III. Equitable Principles

Nor is there any basis for granting review of the Solicitor General's fourth claim: that the Second Circuit transgressed a "fundamental limitation" in entering an injunction and failing to dismiss this case on the basis of 5 U.S.C. § 702(1). Pet. at 12, 28-30. This subsection of the APA provides that "[n]othing" in this section "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." No court that has considered the Haitian refugee litigation, in either the Second

or the Eleventh Circuit, has relied on the language of this provision and even Judge Walker did not cite it in his dissent. Nor has this issue been fully briefed or argued in any court.[25] This Court should not for the first time take up this issue absent lower court guidance or any split in the circuits.

Moreover, the Solicitor General's reliance on this provision of the APA is misplaced. No court has ever suggested that this provision is, of its own force, a "fundamental limitation" on equitable relief. Pet. at 28. As the legislative history makes clear, the provision has no independent content, constituting nothing more than a congressional intent not to abrogate various other preexisting limits to judicial review. It was "not intended to affect or change defenses other than sovereign immunity" and all other defenses "remain unchanged." H.R. No. 1656, 94th Cong., 2d Sess. 12 (1976).[26] Thus, § 702(1) imposes no additional constraints on the availability of APA review or injunctive relief.

Absent this statutory underpinning, petitioners are left with the bald assertion that lower federal courts possess some sort of free-floating equitable power to find immigration injunctions "inappropriate," even after finding that actions of INS and other executive officials squarely violate statutes and treaties. Lower federal courts routinely grant injunctions in immigration cases.[27]

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25. Petitioners' brief in the Second Circuit contains only one short paragraph referring to section 702(1) of the APA. Brief for Appellees at 62.

26. This discussion also permeated the Senate Hearings on the provision. *See generally Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). Nor does that legislative history reflect the sort of undue deference to executive prerogatives suggested by petitioners. *See, e.g.*, S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976) ("To the extent that this obsolete [sovereign] immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.").

27. *See, e.g., Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom. McNary v. HRC*, 111 S. Ct. 888 (1990) (enjoining INS from applying (continued...)

Nor does the APA entitle courts to withhold equitable relief in an immigration case simply because it touches upon foreign affairs.

Notwithstanding petitioners' claim that 5 U.S.C. § 702(1) creates a broad, standardless judicial discretion to deny equitable relief, the standards for granting injunctions are well-established and were applied correctly in this case. In the Second Circuit, "[t]he party seeking the [preliminary] injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief." *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991). Contrary to petitioners' assertion that "nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would . . . justify" the injunctive relief ordered below, Pet. at 30, n.17, the District Court found that petitioners "undeniably [made] a substantial showing of irreparable harm," Pet. App. at 166a. Petitioners did not even contest that showing before the Second Circuit, which noted the uncontested evidence that "heightened political repression [is] currently occuring in Haiti [and that] specific plaintiffs who had been returned have since been abused, were tortured and were in hiding in fear for their lives." *Id.* at 5a. Under the "two-court rule," these unchallenged factual findings deserve substantial deference from this Court. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Accordingly, petitioners' predictions that the injunctive relief ordered will cause a "loss of life" or that the

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27.(...continued)
procedures in Special Agricultural Worker application process depriving applicants of constitutional and statutory rights); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (enjoining INS from depriving Haitians of due process by accelerating asylum and deportation proceedings); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (permanently enjoining INS from procedures exhibiting pattern and practice of violating rights of aliens held in INS custody).

embassy refugee program obviates the need for an injunction are contrary to the record, irrelevant, and totally unworthy of further review by this Court. Pet. at 28, 29 n.17.

Finally, petitioners' overblown claim that the injunction interferes with the conduct of foreign, military or diplomatic policy, Pet. at 28-29, was correctly and forcefully rejected by the Second Circuit.[28] That court found that Congress, in the exercise of its "'complete,' 'plenary' legislative power over immigration matters, *see Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Boutelier v. INS*, 387 U.S. 118, 123 (1967), has spoken directly to the question at issue so that '[t]his is a job for the Nation's lawmakers, not for its military authorities.'" (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Pet. App. at 37a.

For their claim that lower federal courts have a broad roving power to deny equitable relief, petitioners cite *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985), which is inapposite here. *Sanchez-Espinoza* involved a request for equitable relief against federal officials to stop torts committed by U.S-funded military actors during a war in Nicaragua. In *Sanchez-Espinoza*, there was no federal statute, such as § 243(h) here, that by plain language imposed a mandatory duty on executive officials that the court could enforce.[29]

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28. As the Second Circuit pointed out, that claim is rendered all the more suspicious by Section 3 of the "executive order, [which] specifically states that it was 'intended only to order the internal management of the Executive Branch.'" Pet. App. at 37a.

29. Petitioners also cite the dissenting opinion in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated on other grounds*, 471 U.S. 1113 (1985). In *Ramirez*, the *en banc* majority found that a federal court "must take jurisdiction" of a complaint that "is neither insubstantial nor frivolous." *Ramirez*, 745 F.2d at 1533. As in *Ramirez*, the injunction here does not run extraterritorially, but against "officials of the United States government present in Washington, D.C." *Id.* at 1531. In such cases, "it is the role of the courts within the constitutional scheme." Judge Wilkey wrote, "to adjudicate and remedy claims of actual injury resulting from specific, unlawful Executive action." *Id.* at 1531.

Likewise, the claim that the injunction will "undermine the ability of this Nation to speak with one voice," Pet. at 29, is a sham. Here it is Congress and the President who have spoken with one voice upon enacting § 243(h) of the INA and it is petitioners who are disrupting that single voice with their new interdiction policy.[30] Petitioners can harmonize national policy with statutory and treaty law simply by obeying § 243(h) and Article 33 of the Refugee Convention, as they did for the previous decade.

In sum, this Court should not review the appropriateness of the granting of equitable relief as that issue was neither fully briefed nor argued below, no circuit split exists with regard to that issue, and no lower court has relied on the APA provision now resurrected by petitioners. Neither statute nor judicial precedent authorize lower federal courts to refuse to enforce the law or to exercise an unchecked and unchartered power to dismiss cases that are properly before them.

IV. The Judgment Below Is Correct

The decision below rests on the simple, unassailable logic that Congress meant what it said when it rewrote § 243(h) in 1980. The Second Circuit held only that when Congress directed that the Attorney General "shall not . . . return any alien . . . to a country" where she faced political persecution, it meant just that. Petitioners would have this Court read "shall not" to mean "may," "return" to mean "expel," and "any alien" to mean "any alien within the United States." In effect, petitioners would rewrite Congress' words to read: "the Attorney General is authorized, in his unreviewable discretion, to expel any alien who is not within the United States to a country where such alien's life or freedom would be threatened on account of . . . political opinion." Yet ironically, that language is nearly identical to the

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30. As noted above, the Executive itself has spoken with more than one voice on this issue, previously reading Article 33.1 in a contrary fashion. *Supra*, n.3. As the Second Circuit said, "it is not clear here precisely what position of the [executive] this court ought to defer to...." Pet. App. at 30a.

text that Congress amended when it passed the 1980 Refugee Act. *See* p. 2, *supra*. As Judge Pratt noted, "[t]o accept the government's reading of the statute, we would in effect be reading . . . words . . . back into § 243(h)(1) . . . which would counter Congress's plainly expressed intent" to change those words in 1980. Pet. App. at 18a.

The Second Circuit's ruling is only bolstered by petitioners' concession that the 1980 Refugee Act revised § 243(h) "to conform its language to Article 33" of the Refugee Convention. Pet. at 22. That self-executing provision states even more categorically that "[n]o Contracting State shall expel or return ('*refouler*') a refugee in *any manner whatsoever to the frontiers* of territories where his life or freedom would be threatened" on account of his political opinion. Pet. App. at 253a (emphasis added). The most natural reading of this language is that the United States shall not return to Haiti Haitian refugees who are fleeing persecution. Yet by their own admission, petitioners would rewrite the treaty language to read that "[n]o Contracting State shall expel or *expel* a refugee *from the "Contracting State" to a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished.*" Pet. at 22 (emphasis added).

Petitioners would overturn the majority opinion below based not on the explicit and uncontrovertible words of the statute and treaty, but on a patchwork of inapposite presumptions, negative inferences, text from other statutory provisions, snippets of legislative and negotiating histories, and their own reinterpreted litigation positions, all stitched together to stand § 243(h) and Article 33 on their heads. Pet. at 17-28. The Second Circuit fully considered and correctly rejected each of these contentions. Moreover, petitioners barely address the most fundamental purpose of 243(h)--to conform United States law with our humanitarian international obligations under Article 33 of the Refugee Convention not to aid and abet persecutors by delivering fleeing refugees into their hands.

Petitioners first invoke a "general presumption" against extraterritoriality derived from *EEOC v. Arabian Am. Oil Co.*,

111 S. Ct. 1227, 1230 (1991) (*Aramco*). Pet. at 17-19. Yet as the court below stressed, petitioners may invoke a "general presumption" against extraterritoriality only where there is an "unexpressed congressional intent," *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In 1980, Congress' intent to apply § 243(h) extraterritorially was not "unexpressed," but clearly stated, not only in its unrestricted definition of "alien," but also through the intentional deletion of the "within the United States" phrase from § 243(h), and Congress' repeated declarations that it was amending that provision to conform U.S. law with Article 33 of the Refugee Convention, which the Court of Appeals found applies outside the territorial United States. Equally significant, both *Aramco* and Justice Stevens' concurring opinion in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), Pet. at 19 n.12, 20, denied extraterritorial application of a statute to activities of private litigants *within a sovereign state*. Thus, both of those opinions implicate comity concerns, which are missing when American law is applied on the high seas, where no single state is sovereign.[31]

Second, petitioners claim that § 243(h) binds only the Attorney General, Pet. at 20, thereby asking this Court to accept the absurd proposition "that the proscription of § 243(h)(1)—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch." Pet. App. at 21a.

Third, petitioners invoke § 243(h)(2)(C), which withholds the benefits of non-return to aliens who have committed serious nonpolitical crimes before arriving the United States. But if, as petitioners claim, § 243(h) were to apply only to aliens "within the United States," the need for the specific reference in (2)(C) to "arrival in the United States" would be entirely superfluous. Pet. App. at 18a-19a. As Judge Pratt noted, to accept petitioners' invitation to read the territorial limititation in § 243(h)(2)(C) back

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31. Nor can petitioners explain why §§ 212(f) and 215(e) of the INA should provide *authority* for their extraterritorial acts, while § 243(h) imposes no concomitant extraterritorial restraint on those activities.

into § 243(h)(1) would effectively nullify Congress' plain intent in eliminating those limiting words in 1980. Pet. App. at 19a.

Fourth, petitioners attribute great significance to the fact that § 243(h) is located in Part V of the INA, entitled "Deportation; Adjustment of Status." Pet. at 21. But as the court below recognized, the location of § 243(h) is an historical relic of no significance. Pet. App. at 19a-21a. Moreover, petitioners' contention is undercut by their argument elsewhere that the language of § 243(h) necessarily applies to *exclusion* proceedings, which are *not* encompassed within Part V of the Act, but in Part IV ("Provision Relating to Entry and Exclusion"). If, as petitioners claim, § 243(h)'s location limits its applicability to aliens in deportation proceedings, it could not act as it undeniably does to protect aliens in exclusion proceedings.

Fifth, petitioners entirely ignore that at the same time Congress deleted the words "within the United States" from § 243(h), it added the asylum provision, § 208, 8 U.S.C. § 1158, which expressly applies only to aliens who are "physically present in the United States." Thus, when Congress intended to limit a provision of the Refugee Act to persons within the United States, it said so explicitly (using the unambiguous "physically present in the United States" language). Where the statute specifically deleted the geographic limit, Congress intended none.[32]

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32. Both the Refugee Convention and the Refugee Act of 1980 sought to establish a tripartite scheme for refugee protection: § 243(h), which creates a right of *non-refoulement* applicable wherever a government encounters refugees; § 208, which establishes asylum procedures for those physically present in the United States; and § 207, which authorizes refugee processing for refugees applying from overseas. Each provision has independent statutory authority. Only § 208 specifically limits its protections to aliens "physically present in the United States." Petitioners concede that although § 207 does not say so explicitly, that section applies to aliens outside the U.S. Petitioners cannot explain why § 243(h), which similarly contains no such limitation and specifically dropped the words "within the United States," should be construed to *require* presence in the United States.

Similarly, petitioners reach past Article 33's plain language to demand judicial deference to a newly minted executive reinterpretation, *see supra*, note 3. They also cite a strained reading of the statements of two foreign delegates—never commented on by the United States and never presented to or considered by the Senate during the 1968 ratification of the U.N. Protocol—as somehow indicative of U.S. intent regarding the provision. Pet. at 22-26. Once again, on these issues, the Second Circuit's contrary conclusions are entirely correct and sensible. Pet. App. at 23a-35a. As Judge Newman observed, the command of both § 243(h) and Article 33 are "absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors." Pet. App. at 42a.

Finally, petitioners speculate that Congress added the words "or return" to § 243(h) in 1980 and removed the reference to any alien "within the United States," to address the *exclusion* of excludable aliens who are physically inside but legally still outside the United States. Pet. at 26-27.[33] This construction ignores that other provisions of the INA carefully employ the term "deport" to encompass both deportation and exclusion proceedings, and would thereby render the word "return" a wholly superfluous part of the statute. *See, e.g.*, 8 U.S.C. §§ 1225(c), 1227(a)(1), 1251(a)(1). Given that the term "deport"

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33. Petitioners offer the speculative hypothesis that Congress deleted the phrase "within the United States," to extend § 243(h)'s benefits narrowly to excludable aliens, thereby mitigating this Court's holding in *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (excludable aliens paroled into the U.S. may not claim § 243(h) relief). Yet petitioners point to nothing in the legislative history that proves that Congress had *Leng May Ma* in mind, that explains why it took Congress so long to repair the statute, or that explains why Congress did not substitute other limiting language for "within the United States" rather than removing the geographic limit altogether. Petitioners cannot explain why Congress should have silently imposed such a limit, when it was plainly amending § 243(h) to implement Article 33 of an international human rights treaty that was intended to have the widest possible scope.

applies to individuals within the United States, the word "return" acquires meaning only if it applies, as the Second Circuit held and as the plain reading compels, to aliens *outside* the territorial limits of the United States. Pet. App. at 22a-23a.

In short, the Second Circuit's reasoning on the merits is correct, effectuates the plain language of statute and treaty, and should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should deny the Solicitor General's petition for certiorari. If the writ is granted, the Court should limit its review to the question whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.

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